Date: July 30, 1997

Case No.: 95-INA-681

In the Matter of:

HELENA SCUDERI,
Employer

On Behalf Of:

GRAZYNA JECHOVA,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 5, 1994, Helena Scuderi ("Employer") filed an application for labor certification to enable Grazyna Jechova ("Alien") to fill the position of Live-out Cook, Italian Cuisine (AF 7-8). The job duties for the position are:

> Plans menus and cooks Italian style dishes, dinners, desserts according to the recipes of Italian cuisine. Cooks layered fresh pasta with chicken, mushrooms and cheese, Raviolacci Stuffed with Spring Herbs and Cheese, Garden - Style Whole Wheat Pappardelle. Portions and garnishes the food. Purchases food supplies and accounts for the expenses incurred. The meals have to be prepared with low fat, low cholesterol and low sodium contents.

The requirements for the position are eight years of grade school, four years of high school, and two years of experience in the job offered.

The CO issued a Notice of Findings on April 26, 1995 (AF 27-30), proposing to deny certification on the grounds that it does not appear that the job offer meets the definition of "employment" as stated in the regulations at 20 C.F.R. § 656.50 (recodified as § 656.3). The CO directed the Employer to provide evidence which clearly establishes that the position, as performed in her household, constitutes full-time employment. The CO then questioned why the Employer is willing to wait for the Alien to begin working as opposed to hiring a more immediately available U.S. worker. Finally, the CO noted that, pursuant to the regulations at 20 C.F.R. § 656.21(b)(2), the Employer must document that his requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States. Accordingly, the CO determined that the Employer's requirement of a high school education should be deleted, as eight years of grade school is sufficient for this occupation.

Accordingly, the Employer was notified that it had until May 31, 1995, to rebut the findings or to cure the defects noted.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

In its rebuttal, dated May 30, 1995, and submitted under cover letter dated May 31, 1995 (AF 31-88), the Employer contended that her family (consisting of herself, her son, and his wife)[2] holds fund raising dinners for charitable, political, and social purposes and, as a result, they need a "chef who's social etiquette matches his/her culinary professionalism." The Employer provided a schedule of the daily activities involved with this position. The Employer stated that she and her family entertain weekly, often two to three times per week, the number of guests ranging from 10 to 25 depending on the occasion, and included a list of dates of entertainment with her rebuttal. The Employer also contended that the cook will not be required to perform any duties that are not related to food preparation.

Next, the Employer included with her rebuttal a statement from Elizabeth Bialeca, a friend of the family, who, in compensation for full-time cooking, received room, board, and access to conveniences of the Employer's residence for the past 10 years. The Employer then stated that all household maintenance is, and will continue to be, done by members of the Employer's household. The Employer asserted that the offered position is a *bona fide* job offer for a permanent and full-time position.

The Employer then stated that:

> The employer is not willing to wait for the alien to start working, but is rather forced to as there are not qualified and willing U.S. workers available for this position. This employer has tested the U.S. job market adequately.

She included a copy of her telephone bill, several recipes, and several newspaper articles with her rebuttal.

The CO issued the Final Determination on June 16, 1995 (AF 89-91), denying certification because it does not appear that a full-time job opportunity exists for this Employer in violation of § 656.3. The CO stated, "... that the position of 'Cook' was created solely for the purpose of qualifying the Alien for a visa as a skilled worker, the only household occupation which falls into the skilled worker category." The CO noted that the Employer has amended the educational requirements and agreed to readvertise; however, as the Employer has not demonstrated that the job opportunity meets the definition of full-time employment, this option will not be afforded.

On July 21, 1995, the Employer requested review of the Denial of Labor Certification (AF 92-108). On September 11, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). Counsel for the Employer submitted a Legal Brief on October 6, 1995.

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[2] The Employer gives the impression that her husband is also part of her household in her rebuttal; however, in a newspaper article dated November 4, 1990, which is attached to the rebuttal, it states that her husband died "last March" (AF 49).

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 28-29). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, and how the children are cared for during the Alien's scheduled time off; and, (5) who will perform the general household maintenance duties such as cleaning, clothes washing, vacuuming, etc.

In her rebuttal, the Employer provided a daily and weekly schedule of the Alien's cooking duties (AF 85-86). In addition, the Employer provided recipes for meals that the Alien will be required to cook (AF 69-79). The Employer further stated that she and her family frequently entertains guests and supplied an entertainment schedule for the previous 12 months (AF 84). She explained that the cook will not be required to perform any duties which are not related to food preparation. The Employer also submitted a statement from a friend of the family who performed the cooking duties for the previous 10 years in return for room and board and access to the conveniences of the Employer's residences (AF 80). Finally, the Employer stated that household maintenance duties are performed by members of the Employer's household.

As indicated, the issue here is whether or not the CO's conclusion, that full-time employment is not being offered, is a reasonable inference from these facts. The Employer has indicated the conditions of employment on the Application for Alien Employment Certification form ETA 750, under penalty of perjury pursuant to 28 U.S.C. § 1746 (see 20 C.F.R. § 656.20(c)(9). These conditions of employment state that 40 hours of employment are being offered per week at a wage of $13.64 per hour. There is no evidence in the record to the contrary. Essentially, the dispute comes down to the Employer's assertion that preparation of a particular meal takes a certain amount of time, while the CO disagrees and says that the meal in

question takes a lesser amount of time. The CO's conclusion that, in fact, the duties described could not constitute 40 hours of work, are speculative at best.

Therefore, we find that the CO's conclusion that full-time employment is not being offered is not supported by sufficient evidence, and that this matter must be remanded for the Certifying Officer to permit advertisement of the position with reduced educational requirements as offered by the Employer. On Remand, the CO is permitted to develop additional evidence if it is believed that full-time employment is not being offered.

Further, we note that this job opportunity contains a requirement for two years of specialized cooking experience which could be considered to be unduly restrictive. The job requirements include two years of experience in the job duties of Italian cooking. The practical effect of this requirement is to eliminate any U.S. applicant with two years of cooking experience, but no experience in Italian cooking. Therefore, on remand, the CO is also directed to consider whether the Employer's requirement of two years of experience in cooking Italian foods is unduly restrictive, thus requiring a showing of business necessity in accordance with 20 C.F.R. § 656.21(b)(2)(i)(B), which provides that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States as defined in the *Dictionary of Occupational Titles* (DOT).

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further action in accordance with this decision.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes, concurring:

I agree with my colleagues that the matter should be remanded for a determination as to whether the Employer's requirement of two years of experience in Italian cooking is unduly restrictive. However, I do this purely on the basis of due process to be afforded Employer in having his application processed, since from a legal standpoint a *prima facie* case has been demonstrated on the record that the requirement is unduly restrictive, in that it is a preference and not a business necessity for the household. This, however, was not pointed out to Employer by the CO, and was not a basis cited for denial of certification.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.